Jagathisan a/l Muthoosamy v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–75 OF 2009
HASAN LAH, ABDUL MALIK ISHAKAND AZHAR MA'AH JJCA
6 JUNE 2012

Criminal Law — Dangerous Drugs — Trafficking — 949g cannabis found in car — Dangerous Drugs Act 1952 ss 39B(1)(a) & (2)

Criminal Procedure — Appeal — Appeal against conviction and sentence — Death sentence — Defence version different — Defence averred there were two suspects — Whether appellant was sole trafficker — Whether there was another passenger during arrest

Acting on information received that an Indian man ('the appellant') will be trafficking in dangerous drugs at a Shell petrol station, SP5, a Chief Inspector, led a police party and proceeded to the place. There, SP5 saw a Proton motorcar driven by the appellant, who was all by himself. This was also witnessed by SP6, a detective sergeant. As the appellant got out of the car and headed to the payment counter, SP5 and SP6 and two other police personnel approached and arrested him. A body search revealed nothing incriminating but instead a red plastic bag containing one slab of dried leaves wrapped in transparent plastic suspected to be ganja, was found in the appellant's car. The slab of dried leaves was then confirmed to be 949g of cannabis. In the High Court, the trial judge held that the prosecution had made out a prima facie case and defence of the appellant was called. It was the appellant's version that he had no knowledge of the drugs found in the car. He called SD2 as his witness. According to the appellant, SD2 was a passenger in the motorcar when he (the appellant) was at home taking his bath. He further stated that he had earlier sent two of his workers to section 15, Shah Alam where SD2 was the passenger who sat at the front left passenger's seat. This was supported by SD2's evidence. The appellant also questioned the evidence of SP6 in relation to the recovery of drugs found on the floorboard of the front left passenger's side. While the defence averred that there were two suspects, namely the appellant and SD2, the prosecution argued that the only suspect was the appellant. The appellant was charged, convicted and sentenced to death for trafficking in 949g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s 39B(2) of the DDA.

Held, dismissing appeal and affirming conviction and sentence:

(1) The appellant had failed to raise any reasonable doubt as to his guilt.

There were no appealable errors and the prosecution had proved beyond reasonable doubt the charge against the appellant. The appellant was the sole drug trafficker as per the charge and the right person to be convicted. SP5 mentioned that the Proton motorcar was driven by one male Indian, referring to the appellant. This tallied with what was recorded by the learned High Court judge in her notes of evidence. In his examination in chief, SP6 also testified the same. Without a doubt, the appellant was the only person in the motorcar at the time of the arrest (see paras 28–31).

(2) The obvious effect of s 132(1) of the Evidence Act 1950 ('Act') was to reverse the privilege against *self-incrimination* as enshrined in common law. The way in which s 132 of the Act was drafted showed that Legislature did not intend that it should apply to affidavit evidence. Under this section, an answer may be forced out of the witness by the judge and the prosecution cannot prosecute the witness on the basis of the answer (see para 39).

(3) It took the defence a long time to introduce SP2 and that was indeed fatal. An early disclosure of the defence would certainly operate in favour of the appellant. The earliest opportunity for the appellant to show the existence of SP2 would be in his cautioned statement but this was not done. The version of the defence had to be put to the relevant prosecution witnesses at the trial. If this was not done, the defence will be criticised as an afterthought or being manufactured (see para 48).

(4) There was no requirement that remarks as to the demeanor of a witness must be recorded at a certain stage of the trial process. It all depended on the facts and circumstances of the case. The trier of facts and decider on the law had the unfettered discretion to decide as to when to record the demeanor of the witness under examination (see para 49).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima bahawa seorang lelaki India ('perayu') akan mengedar dadah berbahaya di stesen minyak Shell, SP5, seorang Ketua Inspektor, telah mengetuai sepasukan polis dan menuju ke tempat tersebut. Di sana, SP5 melihat sebuah kereta Proton dipandu oleh perayu, berseorangan. Ini juga telah disaksikan oleh SP6, seorang detektif Sarjan. Apabila perayu keluar daripada kereta dan menuju ke kaunter bayaran, SP5 dan SP6 dan dua anggota polis yang lain mendekati dan telah menahannya. Satu carian badan tidak mendedahkan apa-apa yang yang menunjukkan salah tetapi sebaliknya sebuah beg merah plastik yang mengandungi satu papak daun kering yang dibalut dengan plastik lutsinar disyaki menjadi ganja, telah ditemui dalam kereta perayu. Papak daun kering tersebut kemudiannya disahkan sebagai 949g ganja. Di Mahkamah Tinggi, hakim bicara memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie dan pembelaan perayu telah dipanggil. Adalah menjadi versi perayu bahawa dia tidak

mempunyai pengetahuan tentang dadah yang ditemui di dalam kereta. Dia telah memanggil SD2 sebagai saksi. Menurut perayu, SD2 merupakan penumpang dalam kereta tersebut ketika dia (perayu) sedang mandi di rumah. Dia juga menyatakan bahawa sebelum itu dia telah menghantar dua jika pekerjanya seksyen 15, Shah Alam di mana SD2 adalah penumpang yang duduk di tempat duduk hadapan di sebelah kiri. Ini telah disokong oleh keterangan SD2. Perayu juga mempersoalkan keterangan SP6 berhubung dadah yang ditemui di lantai sebelah penumpang hadapan di sebelah kiri. Walaupun pembelaan menegaskan bahawa terdapat dua suspek iaitu perayu dan SD2, pihak pendakwaan menghujahkan bahawa hanya perayu yang merupakan suspek. Perayu didakwa, disabitkan kesalahan dan dijatuhkan hukuman mati kerana mengedar 949g ganja, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya Akta 1952 ('ADB') yang boleh dihukum di bawah s 39B(2) ADB.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Perayu gagal menimbulkan sebarang keraguan yang munasabah mengenai kesalahannya. Tidak terdapat khilaf boleh rayu dan pihak pendakwaan telah membuktikan melampaui keraguan munasabah pertuduhan terhadap perayu. Perayu merupakan pengedar dadah tunggal seperti pertuduhan tersebut dan merupakan orang yang betul untuk disabitkan. SP5 menyebut bahawa kereta Proton yang dipandu oleh seorang India lelaki, merujuk kepada perayu. Ini selaras dengan apa yang dicatatkan oleh yang arif hakim Mahkamah Tinggi dalam nota keterangan beliau. Dalam peperiksaan utama, SP6 juga memberikan keterangan sama. Tidak diragui bahawa perayu adalah satu-satunya orang dalam kereta ketika penangkapan tersebut (lihat perenggan 28–31).

(2) Kesan yang jelas s 132(1) Akta Keterangan 1950 ('Akta') adalah mengubah keistimewaan terhadap self-incrimination seperti yang termaktub dalam *common law*. Cara di mana s 132 Akta telah digubal menunjukkan bahawa badan perundangan tidak meniatkan bahawa ia harus terpakai kepada keterangan afidavit. Di bawah seksyen ini, jawapan boleh dipaksa daripada saksi itu oleh hakim dan pendakwaan tidak boleh mendakwa saksi itu atas asas jawapan tersebut (lihat perenggan 39).

(3) Ia mengambil pembelaan masa yang lama untuk memperkenalkan SP2 dan ia sememangnya menjejaskan. Satu pendedahan awal oleh pihak pembelaan pastinya akan memihak kepada perayu. Peluang terawal untuk perayu untuk menunjukkan kewujudan SP2 adalah ketika berada dalam pernyataan beramaran tetapi ini tidak dilakukan. Versi pembelaan telah dikemukakan kepada saksi pendakwaan yang berkaitan ketika perbicaraan tersebut. Jika ini tidak dilakukan, pihak pembelaan akan dikritik sebagai fikiran semuka atau telah diolah. (lihat perenggan 48).

(4) Tiada keperluan bahawa kenyataan tentang sikap seorang saksi mesti direkodkan pada peringkat tertentu proses perbicaraan. Semuanya bergantung kepada fakta dan hal keadaan kes tersebut. Hakim bagi fakta dan penentu undang-undang mempunyai budi bicara mutlak untuk memutuskan bila tingkah laku saksi seseorang tersebut patut direkodkan di bawah pemeriksaan (lihat perenggan 49).]

Notes

For a case on appeal against conviction and sentence, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 196.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Blunt v Park Lane Hotel, Limited, and another [1942] 2 KB 253, CA (refd)

Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)

Ganeshbhai Shankarbhai v The State of Gujarat AIR 1972 SC 1618, SC (refd)

Looi Kow Chai & Anor v Pendakwa Raya [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)

Muniandy & Anor v PP [1973] 1 MLJ 179, FC (refd)

PMK Rajah v Worldwide Commodities Sdn Bhd & Ors [1985] 1 MLJ 86 (refd)

PP v Johar Mustafa [2004] 5 CLJ 187, HC (refd)

Rex v GA Phillips [1936] MLJ Rep 106 (refd)

Riedel-de Haen AG v Liew Keng Pang [1989] 2 MLJ 400, HC (refd)

Shahrullah bin Abdul Rakeb v PP [2012] 4 MLJ 592, CA (refd)

Tang Lew Keng v PP [1968] 2 MLJ 48 (refd)

Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd [1983] 2 MLJ 346 (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), 271
Dangerous Drugs Act 1952 ss 2, 37(da)(vi), 39(1)(a), 39B(1)(a), (2)
Evidence Act 1950 ss 13(3), 132, 132(1), (2)
Evidence Act (Cap 97, 1990 Ed) [SG] s 134

Appeal from: Criminal Trial No 45–5 of 2004 (High Court, Shah Alam)

Gooi Soon Seng (Gooi & Azura) for the appellant.

Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged and convicted, after a full trial, and sentenced to death for trafficking in dangerous drugs, to wit, cannabis weighing 949 grammes, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s 39B(2) of the DDA.

[2] Aggrieved, the appellant now appeals to this court.

[3] The charge as framed by the prosecution reads as follows:

> Bahawa kamu pada 21 Mei 2003 jam lebih kurang 5.00 petang di kawasan stesyen minyak Shell, Abah Trading Sdn Bhd, Lot 1, Persiaran Jubli Perak, seksyen 17, Shah Alam, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya iaitu 949 gram cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

[4] Acting on information received, Chief Inspector Mohd Husni bin Manaf (SP5) led a police party and proceeded to the place as specified in the charge. SP5 and his police party waited at the Shell petrol station as per the charge for about half an hour. The information which SP5 received pertained to one Indian man who will be trafficking in dangerous drugs driving a white Proton motorcar bearing registration number BCM 4828 ('Proton motorcar') at the Shell petrol station.

[5] At about 5pm, SP5 saw the Proton motorcar driven by an Indian man, who was alone, entered the Shell petrol station and stopped at pump number 2.

[6] Detective Sergeant Mokhtar bin Abd Ghani (SP6) together with his two police personnel, who kept vigil, also saw what SP5 saw. SP6 then saw the Indian man got out of the Proton motorcar, which was parked at pump No 2, and proceeded to the payment counter of the Shell petrol station.

[7] As directed by SP5, SP6 and his two police personnel approached the Indian man and placed him under arrest (now identified as the appellant).

[8] SP5 also accompanied by his two police personnel then proceeded to

bodily searched the appellant and nothing incriminating was found on him. SP5 examined the Proton motorcar in the presence of the appellant and the police party and SP5 found a red plastic bag on the floor board of the front left passenger's side. On opening the red plastic bag, SP5 found one slab of dried leaves wrapped in transparent plastic suspected to be ganja.

[9] The appellant and the exhibits were then taken to the police station at Shah Alam. In due course, the slab of dried leaves were sent to the government chemist Wan Rahimah bt Wan Ahmad (SP1) for analysis. SP1 analysed and confirmed that the slab of dried leaves to be cannabis weighing 949g, a dangerous drug, within the meaning of s 2 of the DDA.

[10] As a trier of facts and a decider on the law, the learned High Court judge rightly determined, at the close of the prosecution's case, that the prosecution has made out a prima facie case (s 180(1) of the Criminal Procedure Code; *Looi Kow Chai & Anor v Pendakwa Raya* [2003] 2 MLJ 65; [2003] 2 AMR 89 (CA); and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC)) and Her Ladyship called the defence of the appellant for an offence of trafficking in dangerous drugs as per the charge after analysing the evidence on a maximum evaluation basis.

THE DEFENCE OF THE APPELLANT

[11] The appellant gave evidence under oath and he too called Nyanaraja a/l Nyanaselan (SD2) as his witness.

[12] In his defence, the appellant denied knowledge of the drugs in the Proton motorcar. According to the appellant before his arrest, SD2 was a passenger in the Proton motorcar and SD2 was left in the said motorcar when the appellant was in his (appellant's) house to take his bath.

[13] And when the Proton motorcar entered the Shell petrol station that fateful day, SD2 was a passenger who sat at the front left passenger's seat and SD2 alighted in order to go to the toilet at the Shell petrol station. The appellant also testified that he had earlier on sent two of his workers in the Proton motorcar to section 15, Shah Alam. The appellant, once again, denied knowledge of the red plastic bag containing the drugs.

[14] According to the appellant, SP5 was not at the Shell petrol station on that fateful day and that he only met SP5 when the police took him to section 11, Shah Alam.

[15] The appellant also questioned the evidence of SP6 pertaining to the

recovery of one slab of dried leaves wrapped in transparent plastic suspected to be ganja that was found on the floorboard of the front left passenger's side.

[16] SD2 testified for the appellant. His testimony went along the following lines:

(a) that he is also known as 'Ayah' and that he knew the appellant since the year 2000;

(b) that he was asked by Kanan (the share partner of the appellant) to be a witness for the appellant;

(c) that he was in the appellant's house and sat in the Proton motorcar while waiting for the appellant to take his (appellant's) bath;

(d) that he obtained a lift in the appellant's Proton motorcar and he sat at the front left seat of the said motorcar next to the driver;

(e) that when the appellant drove the Proton motorcar to the Shell petrol station, the appellant let him alight from the said motorcar to go to the toilet because he had a stomach ache;

(f) that when he got out of the toilet, he saw the appellant being handcuffed and he ran away because he was afraid;

(g) that when he was asked by the defence counsel as to why he sat in the Proton motorcar while waiting for the appellant to take his (appellant's) bath, he said that he is afraid to answer the question; and

(h) he refused to give evidence after the High Court disallowed the defence counsel application to invoke s 132 of the Evidence Act 1950.

ANALYSIS

[17] The prosecution argued that there was only one suspect and that would be the appellant. The defence pointed out that there were two suspects, namely, the appellant and SD2.

[18] Learned defence counsel tendered a one page type written notes of evidence of SP5 which we marked as exh 'A' and he drew our attention to the following passage that appeared therein which reads as follows:

> Selepas mengarahkan kedua-dua suspek ditangkap saya terus pergi ke sana dan dapati suspek telahpun ditangkap oleh anggota saya.

[19] The English language translation of this passage reads as follows:

A After directing both suspects to be arrested, I immediately went there and I found that the suspect was already arrested by my police personnel.

[20] In exh 'A', the following passages in the evidence of SP5 appeared:

B Saya buat pemeriksaan badan. Tidak berjumpa apa barang-barang yang salah. Saya ada periksa dokumen dari suspek dan dapati dia adalah Jagathisan. Saya masih boleh cam suspek yang bernama Jagathisan. Beliau ada di dalam kandang OKT. Mahkamah: Tertuduh dicamkan.

C **[21]** And the English language translation of these passages are as follows:

I did a body search. I did not find any incriminating article. I checked the suspect's document and found him to be Jagathisan. I can still identify the suspect named Jagathisan. He is in the dock.

D Court: Accused identified.

[22] Continuing with his testimony, SP5 had this to say in exh 'A':

E Seorang sahaja yang telah ditangkap. Semasa kereta Proton Saga masuk ke dalam stesyen minyak Shell saya tak perasan ada berapa orang yang berada dalam kereta itu.

[23] The English language translation of these passages are as follows:

F Only one person was arrested. When the Proton Saga motorcar entered the Shell petrol station, I was not aware how many persons were inside the said motorcar.

[24] Flowing from what was contained in exh 'A', learned defence counsel G argued that, firstly, there were two suspects involved in the case, namely, the appellant and SD2. Secondly, that SP5 was unsure as to how many persons were inside the Proton motorcar.

[25] We were also shown the handwritten notes of evidence recorded by the H learned High Court judge and we accordingly marked it as exh 'B'. At p 4 of exh 'B', the learned High Court judge recorded the evidence of SP5 at the examination-in-chief stage and this was what Her Ladyship wrote:

I Selepas mengarahkan kedua-dua anggota menangkap suspek saya terus pergi ke sana dan dapati suspek telahpun ditangkap oleh anggota saya. Saya buat pemeriksaan badan. Tidak berjumpa apa barang-barang yang salah. Saya ada periksa dokumen dari suspek dan dapati dia adalah Jagathisan. Saya masih boieh cam suspek yang bernama Jagathisan. Beliau ada di dalam kandang OKT.

Mahkamah: Tertuduh dicamkan.

[26] The English language translation of these passages recorded in writing by the learned High Court judge marked as exh 'B' are as follows:

> After directing both police personnel to arrest the suspect, I immediately went there and I found that the suspect was already arrested by my police personnel. I did a body search. I did not find any incriminating article. I checked the suspect's document and found him to be Jagathisan. I can still identify the suspect named Jagathisan. He is in the dock. Court: Accused identified.

[27] The learned High Court judge continued to record the evidence of SP5 at the examination-in-chief stage in longhand as reflected in exh 'B':

> Seorang sahaja yang telah ditangkap (only one person was arrested).

[28] SP5 also alluded to the police report that was lodged by him pertaining to the arrest of the appellant and the seizure of one slab of dried leaves wrapped in transparent plastic suspected to be ganja and this piece of evidence was recorded in longhand by the learned High Court judge in exh 'B'. The police report was lodged by SP5 on 21 May 2003 at 7.20pm and it was tendered as exh 'P14'. In that police report, SP5 mentioned that the Proton motorcar was driven by one male Indian by the name of Jagathisan a/l Muthoosamy — referring to the appellant.

[29] What was recorded by the learned High Court judge in exh 'B' tallied with the notes of evidence compiled in the appeal record at *jilid* 1 which showed that only one suspect was involved. At p 60 of the appeal record at *jilid* 1, SP5 testified as follows:

> Selepas mengarahkan kedua-dua anggota menangkap suspek saya terus pergi ke sana dan dapati suspek telahpun ditangkap oleh anggota saya (After directing both police personnel to arrest the suspect, I immediately went there and I found that the suspect was already arrested by my police personnel).

[30] SP6 and his two police personnel waited near the Shell petrol station as per the charge for half an hour and he saw the Proton motorcar driven by the appellant entered the Shell petrol station. SP6 testified that he only saw one person inside the Proton motorcar and that person was the appellant. At p 85 of the appeal record at *jilid* 1, SP6 testified in examination-in-chief as follows:

> Kami membuat pemerhatian lebih kurang setengah jam. Semasa membuat pemerhatian saya nampak sebuah kereta Proton Saga berwarna putih dengan nombor pendaftaran BCM 4828 masuk ke dalam stesyen minyak Shell. Saya nampak seorang sahaja yang berada di dalam kereta semasa kereta masuk ke dalam stesyen minyak Shell.

[31] Without a doubt the appellant was the only person in the Proton motorcar at the time of the arrest. At p 86 of the appeal record at *jilid* 1, SP6 testified under examination-in-chief as follows:

> Selepas itu kami terus menahan lelaki India tersebut. Kami menahan lelaki India itu di hadapan pam minyak.

[32] The police report in exh 'P14' lodged by SP5 confirmed that the appellant was the only person who was seen driving the Proton motorcar on that fateful day and that there was no one else in the said motorcar. Under cross-examination, the appellant agreed that he purchased the said motorcar from Zulkarnain bin Md Noh (SP4) on 31 March 2003 as reflected in exh 'P13'. SP4 also testified to the same effect. This meant that on the date of the offence as per the charge, the appellant was driving alone in his own motorcar.

[33] Yet the appellant introduced the presence of another person by the name of 'Ayah' ('SD2') who was said to be seated at the front left passenger's seat and had alighted from the said motorcar in order to go to the toilet at the Shell petrol station. And while the trial was ongoing before the learned High Court judge, the existence of 'Ayah' was not put to members of the raiding party. To compound the matter further, the existence of 'Ayah' was also not put to the investigating officer of the case in the person of Chief Inspector Idris bin Seth (SP7). Even the cautioned statement of the appellant did not make any reference to SD2. The defence of the appellant was based on the appellant's cautioned statement and this was announced by the appellant's defence counsel when cross-examining SP7 as reflected at p 108 of the appeal record at *jilid* 2:

> PB : I am putting the defence case as stated in the accused's cautioned statement.
>
> SP7 :Ya, ada percakapan beramaran Tertuduh di dalam kertas siasatan.

[34] The introduction of SD2 came as a surprise to the learned deputy public prosecutor ('DPP') and he objected as seen at pp 159–160 of the appeal record at *jilid* 2:

> TPR: Membantah atas alasan-alasan berikut:
>
> (1) sepanjang perbicaraan berjalan hanya semalam nama Ayah ditimbulkan.
>
> (2) semasa perbicaraan berjalan tidak ada cadangan ditujukan kepada anggota serbuan bahawa wujudnya 'Ayah'.
>
> (3) penama 'Ayah' juga tidak dibangkitkan semasa I.O. memberi keterangan dan ini jeias daripada nota-nota keterangan SP7.
>
> (4) juga dalam percakapan beramaran tertuduh, tidak ditimbulkan nama penama ini.

(5) oleh itu pihak pendakwaan tidak tahu kewujudan penama ini dan tidak dapat siasat perkara ini.

(6) sekiranya dibenarkan akan memprejudiskan pihak pendakwaan dan akan menggalakkan pembelaan untuk tidak membangkitkan kewujudan penama-penama di kes-kes yang lain sebelum memanggil mereka pada tahap pembelaan.

(7) secara analogy untuk pembelaan alibi, notis alibi juga perlu diberikan supaya pihak polis boleh menyiasat kesahihan notis alibi.

(8) akan tetapi tidak dapat mencari otoriti yang menyokong penghujahan saya.

[35] But the learned High Court judge overruled the objection and allowed SD2 to give his evidence on oath. And so we have the evidence of SD2 as reflected at pp 160–178 of the appeal record at *jilid* 2. Midway through his evidence at the examination-in-chief stage, SD2 became reluctant to continue giving his evidence. He said that he was afraid. Learned defence counsel then applied to invoke s 132 of the Evidence Act 1950 in order to compel SD2 to answer. When the learned High Court judge asked for authorities to support learned defence counsel application, none was provided except reliance on s 132 of the Evidence Act 1950. The DPP vehemently objected. Learned defence counsel replied and pointed out that in the interest of justice the wrong person should not be convicted and the learned High Court judge disallowed the defence application to invoke s 132 of the Evidence Act 1950. The notes of evidence at pp 164–166 of the appeal record at *jilid* 2 showed what had transpired before the learned High Court judge:

Soalan: Sebenarnya mengapa kamu duduk di dalam kereta dan tidak duduk di dalam rumah?

Jawapan: Saya berasa takut untuk menyatakan sebab.

Soalan: Mengapa berasa takut?

Jawapan: Saya takut kena tangkap polis.

Soalan: Apakah sebab lain kamu duduk di dalam kereta dan tidak duduk dalam rumah?

Jawapan: Ada sebab lain.

Soalan: Ada ketakutan yang lain?

Jawapan: Tidak ada ketakutan yang lain.

P.B. Making an application under s 132 of the Evidence Act to compel the witness to answer. (Reads s 132).

Court: What are your authorities?

P.B.: I have none. I only rely on s 132. That is all.

TPR: Membantah permohonan ini atas alasan-alasan yang dihujahkan tadi. S 132 tidak sepatutnya digunakan sewenang-wenangnya.

Saksi ini tidak didedahkan secara awal dan tiba-tiba dipanggil untuk memberi keterangan. Tak cukup dari membuat perkara itu pihak pembelaan inginkan saksi ini diberi immunity oleh mahkamah.

Sekiranya kewujudan saksi ini didedahkan dari awal serta peranannya, permohonan sedemikian boleh dibenarkan oleh mahkamah ini.

Mahkamah ini ialah tempat untuk mentadbir keadilan dan bukan untuk saksi datang ke mahkamah ini dan bermain-main semasa memberi keterangan. Dia harus sedar apakah akibat dia memberi keterangan di dalam mahkamah ini. Itu sahaja.

P.B.: Undang-undang adalah jelas di bawah s 132. Dari segi keadilan adalah perlu untuk kemukakan saksi ini. Dengan tujuan mahkamah ini boleh mencapai satu keputusan yang adil dan saksama supaya seorang yang tidak salah tidak didapati bersalah sedangkan orang yang membuat salah adalah orang yang lain selain daripada tertuduh. Itu adalah tujuan permohonan saya di bawah s 132.

Mah: Permohonan adalah ditolak atas alasan-alasan yang diberikan oleh TPR yang bijaksana.

[36] But learned defence counsel defied the order of the learned High Court judge in rejecting the application to invoke s 132 of the Evidence Act 1950 by asking leading questions to SD2 which attempted to show that it was SD2 who had placed the drugs in the Proton motorcar. The learned High Court judge rejected this line of questioning and learned defence counsel rephrased the question. SD2 replied that he was afraid to divulge for fear of being arrested by the police. The notes of evidence at pp 166–167 of the appeal record at *jilid* 2 reflected what had transpired before the learned High Court judge:

Soalan: Pada hari itu adakah kamu membawa apa-apa barang salah semasa kamu duduk di kerusi di bahagian hadapan di sebelah pemandu?

Jawapan: Saya takut untuk memberitahu.

Soalan: Adakah kamu membawa satu bungkusan dadah ganja dan letak di bawah kerusi penumpang hadapan di sebelah pemandu pada 21.5.2003 antara pukul 2.30 petang hingga 3.30 petang iaitu di dalam kereta tertuduh?

Mah: Soalan tidak dibenarkan kerana soalan memimpin.

P.B. I will rephrase it.

Soalan: Pada 21.5.2003 antara 2.30 petang hingga 3.30 petang adakah kamu buat apa-apa semasa kamu duduk di atas kerusi penumpang hadapan di sebelah pemandu kereta tersebut?

Jawapan: Saya takut untuk memberitahu.

Soalan: Apa sebenarnya ketakutan kamu?

Jawapan: Kalau saya beritahu saya takut ditangkap oleh polis.

Soalan: Sebenarnya mengapa kamu melarikan diri setelah melihat polis menggari tertuduh di stesyen minyak Shell?

Jawapan: Saya takut untuk memberitahu.

Soalan: Takut apa?

Jawapan: Takut ditangkap oleh polis.

[37] At this juncture, learned defence counsel renewed his application under s 132 of the Evidence Act 1950 by stating that he had asked sufficient questions to invoke the application of the said section. The DPP objected and the learned High Court judge rejected the application. And the matter ended there. The notes of evidence at pp 167–168 of the appeal record at *jilid* 2 read as follows:

P.B : Pray to renew my application under s 132 Evidence Act. I have asked sufficient questions which will incriminate or may tend directly or indirectly to incriminate on ground he is scared that if he answers the question he will be arrested by the police.

TPR Membantah atas alasan-alasan dan penghujahan yang sama. Sama sahaja. Tidak ada apa-apa perkembangan.

Man Permohonan adalah ditolak atas alasan yang diberikan oleh TPR yang bijaksana.

P.B. : That will be all. I have no further questions.

[38] It is now ideal to refer to s 132 of the Evidence Act 1950:

Witness not excused from answering on ground that answer will criminate

132

(1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.

(2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

(3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of subsection (2).

[39] The obvious effect of s 132(1) of the Evidence Act 1950 is to reverse the privilege against self-incrimination as enshrined in the English common law. Lord Goddard LJ in *Blunt v Park Lane Hotel, Limited, and another* [1942] 2 KB 253 aptly said that the privilege against self-incrimination gives a witness the right to refuse to answer any question on the ground that it may expose him to any criminal charge, penalty or forfeiture. Put in another way, under the English common law a witness may refuse to answer questions which tend to criminate him.

[40] Zakaria Yatim J (later FCJ) in *PMK Rajah v Worldwide Commodities Sdn Bhd & Ors* [1985] 1 MLJ 86 held that s 132 of the Evidence Act 1950 does not apply to affidavit evidence because, according to his Lordship, a witness in the context of s 132 must necessarily refer to a person who testifies on oath or affirmation in a court and is subject to examination-in-chief, cross-examination and re-examination; and that a person who gives affidavit evidence is not a 'witness'.

[41] Chan Sek Keong J (now Chief Justice of Singapore) in *Riedel-de Haen AG v Liew Keng Pang* [1989] 2 MLJ 400 held that the privilege against self-incrimination as granted pursuant to s 132 of the Evidence Act 1950 (the Singapore equivalent is s 134 of the Evidence Act (Cap 97, 1990 Ed)) does not apply to affidavit evidence but only in relation to oral evidence.

[42] NH Chan J (later JCA) in *Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346 held that s 132 of the Evidence Act 1950 does apply to affidavit evidence because, according to His Lordship, a witness is a person who 'furnishes' evidence, whether orally or by affidavit.

[43] With respect, the way in which s 132 of the Evidence Act 1950 is drafted shows that the Legislature does not intend that it should apply to affidavit evidence.

[44] Be that as it may, s 132(2) of the Evidence Act 1950 envisages the situation when a witness is compelled by the court to answer a question and the answer shall not subject the witness to any arrest or prosecution or be proved against the witness in any criminal proceeding except a prosecution for giving false evidence by the answer given by the witness thereto (*Rex v GA Phillips* [1936] MLJ Rep 106; *Tang Lew Keng v Public Prosecutor* [1968] 2 MLJ 48; *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63; and *Muniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179 (FC)).

[45] It is the duty of the presiding judge by virtue of s 13(3) of the Evidence Act 1950 to explain to the witness the ramifications of s 132(2) thereof.

[46] What is clear is this. That by virtue of s 132 of the Evidence Act 1950 an answer may be forced out of the witness by the judge and the prosecution cannot prosecute the witness on the basis of the answer. A

[47] The refusal of the learned High Court Judge to invoke s 132 of the Evidence Act 1950 for the benefit of SD2 drew criticisms by the defence. Before us, it was argued that Her Ladyship had misdirected herself when dismissing the application by defence counsel to compel SD2 under s 132 of the Evidence Act 1950 to answer relevant questions put to him on the grounds that SD2 was not exposed earlier and was suddenly called to give evidence. It was also argued that such refusal by Her Ladyship has occasioned a serious miscarriage of justice in that the evidence of SD2 if procured is essential to the just decision of the case. B C

[48] It must be borne in mind that the trial started on 13 November 2007 when the first prosecution's witness SP1 took the stand. The appellant (SD1) gave his evidence on 30 March 2009. And calculation wise, the span of time between 13 November 2007–30 March 2009 would be one year four months and 17 days. It took the defence that long a time to introduce 'Ayah', so to speak, to the prosecution. That was indeed fatal. An early disclosure of the defence would certainly operate in favour of the appellant. The earliest opportunity for the appellant to show the existence of 'Ayah' would be in his cautioned statement but this was not done. The version of the defence has to be put to the relevant prosecution witnesses at the trial. If this is not done, like the present appeal at hand, then the defence will be criticised as an afterthought or being manufactured (*Public Prosecutor v Johar Mustafa* [2004] 5 CLJ 187). The learned High Court judge in her written grounds of judgment at pp 243–247 of the appeal record at *jilid* 3 analysed the defence of the appellant in trenchant terms: D E F

> Dalam kes pembelaan, tertuduh cuba meletakkan tanggungjawab untuk barang-barang kes tersebut ke atas bahu kawannya, SD2 dengan memberitahu mahkamah bahawa abangnya yang telah bertanyakan SD2 mengenai perjumpaan dadah tersebut di dalam kereta tersebut oleh polis, dan abangnya telah diberitahu oleh SD2 bahawa dadah itu diletakkan oleh SD2. Akan tetapi pembelaan ini tidak pernah ditimbulkan semasa kes pihak pendakwaan. Ketika itu pembelaan hanya meminta mahkamah supaya menarik satu inferensi bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan atas kegagalan pihak pendakwaan memanggil dua orang pekerja tertuduh iaitu Tajuddin dan Sulaiman sebagai saksi kerana menurut pembelaan dadah dijumpai di bawah tempat duduk penumpang hadapan kereta tersebut. G H
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> Oleh itu mahkamah berpendapat pembelaan tertuduh itu telah sengaja direka-rekakan oleh tertuduh dan adalah satu pemikiran kemudian supaya tertuduh dapat dilepaskan dan dibebaskan daripada pertuduhan, P2. Mahkamah berpuas hati bahawa tertuduhlah yang telah meletakkan dadah tersebut di tempat letak kaki penumpang hadapan untuk memudahkan beliau mengambilnya apabila beliau I

perlu berbuat demikian untuk diberikan kepada pihak yang lain memandangkan jumlah cannabis seberat 949g itu adalah satu jumlah yang besar dan tidak pernah dibangkitkan oleh tertuduh bahawa cannabis itu ialah untuk kegunaannya sendiri.

Dalam pemeriksaan balas oleh TPR yang bijaksana, tertuduh mengakui telah membeli kereta tersebut daripada SP4, Zulkarnain bin Mohd Nor, seorang lelaki Melayu pada 31 Mac 2003. Tertuduh telah membeli kereta tersebut untuk kegunaan hariannya dan untuk menghantar pekerja-pekerjanya ke *food court*.

Setelah mendengar keterangan SD1 dan SD2 mahkamah tidak mempercayai keterangan tertuduh bahawa pada tarikh kejadian, kawannya, SD2, telah datang berjumpanya kerana dia nak pinjam kereta tertuduh untuk membawa keluarganya ke Selayang untuk menghadiri majlis perkahwinan.

Pada masa itu tertuduh tinggal di rumah abangnya di Bukit Kemuning. Abangnya bernama Prabakharan. Abangnya, kakak iparnya dan anak-anak mereka berada di rumah ketika SD2 datang untuk meminjam keretanya.

Mahkamah tidak mempercayai keterangan tertuduh bahawa SD2 telah menunggu di dalam kereta tertuduh kerana kononnnya hendak dengar radio. Sebabnya ialah SD2 sudah biasa dengan abang dan kakak ipar tertuduh kerana SD2 selalu datang ke rumah tertuduh untuk meminjam kereta jika SD2 ingin membawa keluarganya pergi keluar ke mana-mana dan SD2 pernah meminjam kereta Proton tertuduh sebanyak dua atau tiga kali dan sebelum itu kereta tertuduh yang lain.

Mahkamah juga tidak mempercayai keterangan tertuduh bahawa SD2 telah ikut tertuduh ke tempat kejadian dan telah turun daripada kereta tertuduh dan pergi ke tandas. Sebabnya ialah kerana semasa disoal semula barulah tertuduh menjelaskan bahawa beliau mempunyai dua orang abang. Satu abang bernama Kanan yang merupakan rakan perniagaannya dan satu lagi abang bernama Prabakaran yang merupakan abang saudaranya dan bahawa tertuduh tinggal dengan abangnya yang bernama Prabakharan. Tertuduh telah cuba menjelaskan bahawa abang tertuduh yang telah menghubungi SD2 ialah Kanan sedangkan perkara ini seharusnya dicadangkan kepada saksi-saksi pihak pendakwaan dan juga dikatakan oleh tertuduh semasa tertuduh disoal utama kerana ia merupakan pembelaan tertuduh.

Mahkamah berpendapat cara tertuduh memberitahu mahkamah tentang pembelaannya iaitu secara berperingkat-peringkat dan sebahagian demi sebahagian menunjukkan dengan jelas bahawa pembelaan tertuduh tidak benar sama sekali dan tidak berkemungkinan benar atau menimbulkan satu keraguan yang munasabah dalam kebenaran kes pihak pendakwaan.

Mahkamah mendapati bahawa sepanjang perbicaraan kes ini berjalan iaitu semenjak 13 November 2007 adalah hanya pada 30 Mac 2009 iaitu lebih kurang satu tahun empat bulan baru nama 'Ayah' ditimbulkan sebagai nama seorang kawan tertuduh yang didakwa oleh tertuduh telah turun dari keretanya ketika beliau memandu keretanya memasuki tempat kejadian untuk mengisi minyak.

Sebelum itu semasa perbicaraan berjalan tidak ada cadangan ditujukan oleh pihak pembelaan kepada anggota serbuan bahawa wujudnya penama 'Ayah'.

Penama 'Ayah' juga tidak pernah dibangkitkan semasa pegawai penyiasat, SP7, memberi keterangan. Dalam percakapan beramaran tertuduh, juga tidak ditimbulkan nama penama ini.

Oleh itu tidak hairanlah apabila SD2 memberi keterangan secara bersumpah dan mengatakan beliau ialah 'Ayah' dan bahawa beliau telah mengenali tertuduh lebih kurang tiga tahun sejak tahun 2000 mahkamah tidak mempercayai keterangan itu. Lebih-lebih lagi apabila Encik Gurbachan Singh, peguambela yang bijaksana bagi pihak tertuduh, memohon kepada mahkamah supaya SD2 diberi kekebalan daripada pendakwaan semata-mata untuk membolehkan SD2 memberi keterangan bahawa beliaulah yang telah meletakkan barang-barang kes tersebut di dalam kereta tertuduh di bawah tempat duduk penumpang hadapan supaya tertuduh dapat dilepaskan dan dibebaskan daripada pertuduhan, P2.

[49] Next, it was submitted that the learned High Court judge noted the demeanour of SD2 'quite rampantly' (the words used by learned defence counsel) after Her Ladyship refused to compel SD2 to give his evidence under s 132 of the Evidence Act 1950. It must be clarified, at the outset, that there is no requirement that remarks as to the demeanour of a witness must be recorded at a certain stage of the trial process. It all depends on the facts and circumstances of the case. The trier of facts and the decider on the law has the unfettered discretion to decide as to when to record the demeanour of the witness under examination (s 271 of the Criminal Procedure Code). This court must give due weight in the appraisal of SD2's evidence by the remarks made by the learned High Court judge when recording the evidence of SD2 (*Ganeshbhai Shankarbhai v The State of Gujarat* AIR 1972 SC 1618).

[50] The remarks pertaining to the demeanour of SD2 recorded by the learned High Court judge are itemised herein:

(a) 'Witness folds his arms' (p 168 of the appeal record at *jilid* 2);

(b) 'Witness puts down his arms' (p 168 of the appeal record at *jilid* 2);

(c) 'Witness folds his arms' (p 169 of the appeal record at *jilid* 2);

(d) 'Witness holds his hands' (p 170 of the appeal record at *jilid* 2);

(e) 'Witness folds his arms' (p 170 of the appeal record at *jilid* 2);

(f) 'Witness has a worried look on his face. Moves his hands about.' (p 171 of the appeal record at *jilid* 2);

(g) 'Witness folds his arms. Witness unfolds his arms and holds both palms and fingers together.' (p 174 of the appeal record at *jilid* 2);

(h) 'Witness fidgets with thumbs of his 2 hands.' (p 174 of the appeal record at *jilid* 2);

(i) 'Witness holds the lower part of both his hands.' (p 174 of the appeal record at *jilid* 2);

(j) 'Witness continues to fidget with his hands and his 2 thumbs. Witness stops fidgeting with his hands.' (p 175 of the appeal record at *jilid* 2); and

(k) 'Witness folds his arms.' (p 178 of the appeal record at jilid 2).

[51] Abdul Malik bin Ishak JCA in *Shahrullah bin Abdul Rakeb v Public Prosecutor* [2012] 4 MLJ 592, at pp 645–646, spoke of 'demeanour' in this fashion:

> (64) It is correct to say that all criminal trials are concerned with disputes about facts. In principle and in practice, fact-finding which must necessarily include the assessment of credibility rest on the shoulders of the trial judge who hear and see the witnesses. The appellate court has no such liberty. Judging credibility is a matter of common sense. And credibility stems wholly or partly from an impression of a witness's demeanour. An experienced trial judge can easily detect 'lying' just by looking at the person's demeanour.
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> (65) Dictionaries define the word 'demeanour' in many ways. Thus, it has been defined as 'bearing', 'outward behaviour', 'conduct', 'mien', 'comportment', 'manner', or even 'appearance'. The *Concise Oxford English Dictionary* at p 380 carries a definition of the word 'demeanour' which means 'outward behaviour or bearing'.
>
> (66) 'Body language' is an important feature of demeanour. It is a 'non-verbal communication' that can tell a lot of things for the trial judge to observe and react judicially. If a trial judge's observation of the demeanour of a particular witness cannot be given weight then what is the point of appointing judges to hear cases be it civil or criminal.
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> (67) All witnesses in open court must take the oath. Once the oath is administered, from experience, certain fixed qualities are visible or audible and that would be the sex, age, build, hairstyle and the intonation of the voice. It is the general make up of the witness together with the voice that gives an impact on the trial judge. Again, from experience, the emotions of the witness will be manifested right before the eyes of the trial judge. Depending on the questions posed by the prosecution or the defence, the nervous system of the witness will be activated. Thus, the trial judge will detect blushing, pallor, perspiring, dry mouth, tremors and all kinds of facial expressions. It is blessed to be a trial judge to be able to see all these reactions of the witness when the witness gives evidence.
>
> (68) Witnesses will also exhibit self-expressions like changes in posture, wild gestures, strong facial expression, and sudden change in the voice. All these may be genuine and spontaneous. Some of these signs may be faked attempts to convey sincerity or to elicit sympathy. Of course, it cannot be denied that some people are really good actors or accomplished liars. Some people too may react by losing their temper, fainting, crying, becoming very distressed, hysteria and the urge to go to the toilet.
>
> (69) But we must not forget that human beings show their feelings and they also respond to the feelings of others. They are not robots.
>
> (70) While acknowledging cases like *Leow Nghee Lim v Reg* and *Tengku Mahmood v Public Prosecutor*, it must be emphasised that, in appropriate

> contexts, signs of anxiety, guilt, agitation, embarrassment or other emotions may suggest that the speaker is or is not genuine. An expereinced trial judge can tell the difference. We must trust our judges. Lamran's evidence is reasonable. There is nothing improbable about Lamran's evidence. The learned JC believed Lamran's evidence and his Lordship treatment of Lamran's evidence cannot be faulted. This was not the case where the learned JC convicted the appellant solely on his demeanour. The overwhelming evidence tendered by the prosecution and the weak defence were the crucial factors that turned the tide against the appellant.

[52] Likewise here, the evidence adduced by the prosecution was overwhelming and the defence put up by the appellant was weak and these factors taken together cumulatively weighed heavily against the appellant.

[53] The learned High Court judge in an impeccable judgment at the close of the prosecution's case found, after a maximum evaluation, that there was actual possession of the dangerous drugs by the appellant and correctly invoked the presumption of trafficking under s 37(da)(vi) of the DDA and held that the prosecution had established a prima facie case against the appellant as per the charge.

[54] At the end of the defence case, the learned High Court judge held that the defence was a mere concoction and an afterthought. Her Ladyship disbelieved the evidence of the appellant as well as that of SD2. Her Ladyship also held that the defence failed to rebut the presumption of trafficking under s 37(da)(vi) of the DDA on the balance of probabilities.

[55] The audio-visual advantage enjoyed by the learned High Court judge must be respected. This is something which this court has no opportunity to delve into. From the cold print of the notes of evidence, we found that the learned High Court judge had correctly appraised the facts and the law. We have no reason to disagree with the decision of the learned High Court judge. It is our finding that the appellant had not rebutted the presumption of trafficking under s 37(da)(vi) of the DDA on the balance of probabilities.

[56] It is our judgment that the appellant had failed to raise any reasonable doubt as to his guilt. There are no appealable errors and we are satisfied that the prosecution had proved beyond reasonable doubt the charge against the appellant. It is our judgment that the appellant is the sole drug trafficker as per

A the charge and the right person to be convicted. It is safe to convict the appellant. We consequently dismissed the appellant's appeal. The conviction and sentence are hereby affirmed.

Appeal dismissed and conviction and sentence affirmed.

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Reported by Ibnu Aswan

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